IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 17, 2007

STATE OF TENNESSEE v. TIMOTHY DEWAYNE BOULDIN

Appeal from the Circuit Court for Van Buren County
No. 1816-F Larry B. Stanley, Judge

No. M2006-02354-CCA-R3-CD - Filed February 13, 2008

The defendant, Timothy Dewayne Bouldin, appeals from his Van Buren County Circuit Court jury trial convictions of possession of a schedule IV controlled substance and possession of a schedule VI controlled substance, both Class A misdemeanors. See T.C.A. § 39-17-418. For the Schedule IV conviction, he was sentenced to eleven months and twenty-nine days, with thirty days to be served in jail at seventy-five percent release eligibility, and the balance on probation. For the Schedule VI conviction, he was sentenced to eleven months and twenty-nine days, with ten days to be served in jail at seventy-five percent release eligibility, and the balance on probation. The judge ordered the sentences to be served concurrently. In this appeal, the defendant raises issues regarding the trial court's denial of his motion to suppress, the sentences imposed, and the denial of judicial diversion. We affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JERRY L. SMITH and JAMES CURWOOD WITT, JR., JJ., joined.

Michael Keith Davis, Dunlap, Tennessee, for the appellant, Timothy Dewayne Bouldin.

Robert E. Cooper, Jr., Attorney General and Reporter; Preston Shipp, Assistant Attorney General; Lisa Zavogiannis, District Attorney General; and Thomas J. Miner, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The evidence of record shows that defendant and his minor son lived together in a two-bedroom home in a rural area. During a law enforcement marijuana eradication effort, the National Guard flew a helicopter over the area, and marijuana was spotted growing in the fields near the defendant's home. The authorities went to the area and uprooted eighty-eight marijuana plants, which were about four feet tall, growing in five separate areas. Each area where the marijuana was planted was surrounded by an individual fence, and the plants appeared to have been cultivated and

maintained. The fences used rebar as posts and chicken wire as fencing. A fertilizer bag was found near one of the patches of marijuana. There were trails in the field which led to and from the marijuana patches which appeared to have been made by a small-wheeled vehicle. There was a four-wheeler in the yard of the defendant's residence.

The authorities conducted a warrantless search of an outbuilding located about forty feet from the defendant's house. Fertilizer, rebar, fencing material, trays filled with potting soil, and "grow lights" were found inside. The closest marijuana patch was about sixty-eight yards from the outbuilding.

The authorities obtained a search warrant for the defendant's residence and surrounding property. The affidavit states that marijuana was observed in aerial surveillance and later located from the ground. The affidavit makes no mention of the items found inside the outbuilding. However, the search warrant authorizes the seizure of "marijuana and any and all items related to the cultivation, possession, use, and/or sale of marijuana including but not limited to potting soil, garden tools, chicken wire, rebar, rolling papers, bongs and other smoking devices, currency related to the sale or purchase of marijuana[.]"

During execution of the search warrant, the officers seized various items from the defendant's home. In a bedroom which appeared to belong to a younger person, they seized cocaine powder and fifty blue pills. In a bedroom which appeared to be used by an older person, they found marijuana residue and bottles of pills.

The defendant was charged with possession with intent to sell or deliver 0.5 gram or more of cocaine, manufacture of marijuana by cultivating not less than twenty nor more than ninety-nine marijuana plants, possession with intent to sell or deliver Alprazolam, possession with intent to sell or deliver not less than one-half ounce nor more than ten pounds of marijuana, and possession or casual exchange of Diazepam. Before the defendant's trial, the defendant's son was charged and adjudicated delinquent in juvenile court proceedings related to the controlled substances found in the home and on the land outside the home.

The jury acquitted the defendant on the counts involving manufacturing marijuana and possession of Diazepam. The jury found the defendant guilty of the lesser included offense of misdemeanor possession of Alprazolam on the count alleging possession of Alprazolam with the intent to sell or deliver. The jury found the defendant guilty of the lesser included offense of misdemeanor possession of marijuana on the count alleging possession of marijuana with the intent to sell or deliver. The trial court granted the defendant's motion for judgment of acquittal on the count alleging possession of cocaine.

I

In his first issue, the defendant argues that the trial court erred in denying his motion to suppress evidence from the search. He claims that the authorities' warrantless search of the

outbuilding on his property tainted the subsequent search pursuant to a warrant because the search warrant derived from the warrantless search. The state argues that the search that was conducted pursuant to the warrant was not tainted by the warrantless search because the warrant did not rely on any information obtained during the warrantless search of the outbuilding.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

A similar guarantee is provided in Article 1, Section 7 of the Tennessee Constitution:

> That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described and supported by evidence, are dangerous to liberty.

The essence of these constitutional protections is "to 'safeguard the privacy and security of individuals against arbitrary invasions of government officials.'" State v. Downey, 945 S.W.2d 102, 106 (Tenn. 1997) (quoting Camara v. Municipal Court, 387 U.S. 523, 528, 87 S. Ct. 1727, 1730 (1967)).

Under the "fruit of the poisonous tree" doctrine, evidence that is obtained through exploitation of an unlawful search or seizure must be suppressed. See Wong Sun v. United States, 371 U.S. 471, 488, 83 S. Ct. 407, 417 (1963). However, "[p]ursuant to the independent source doctrine, an unlawful entry does not mandate the suppression of evidence located inside a residence if the evidence is subsequently discovered following the execution of a valid warrant based upon facts independent and separate from information discovered as a result of the unlawful entry." State v. Carter, 160 S.W.3d 526, 532 (Tenn. 2005); see State v. Clark, 833 S.W.2d 597, 600 (Tenn. 1992).

In the present case, the affidavit accompanying the application for a search warrant stated:

> . . . Tennessee National Guard Pilot CWO Pat Unger on August 5th 2002 in the early afternoon hours observed several marijuana patches growing in the woods behind the [previously] described residence. CWO Unger was flying with the Governor's Task Force on Marijuana Eradication at the time of the incident. Further, SFC David Caruthers and I [SA Stephen Talley] did access the marijuana

> plants from another point in the woods at a nearby residence (HC 69 Box 591,) shortly after locating the first patch I heard people arrive at the residence that our vehicles were parked (HC 69 Box 591). Upon hearing the people, I returned to this residence and advised the residents what we were doing. While speaking to the residents, SFC Caruthers located a well worn path from the first marijuana patch which led to several (4 other) patches. All patches were sur[r]ounded by chicken wire which was posted with rebar. Further, SFC Caruthers did locate a well defined foot path from the last (5th) marijuana patch leading through approximately 50 yards of woods; this foot path ended at a grass field approximately 60 yards from the described residence. In addition, a four-wheeler path through the grassy field led from the end of the described foot path back to the residence. While attempting to locate a home owner, I observed four-wheeler in the yard. The resident's son . . . did arrive home while preparing this affidavit and did advise the given address as the correct address and that Tim Boulden is the home owner. TN National Guard CWO Pat Unger has approximately 14 years experience in spotting marijuana from the air, and his spotting of marijuana has led to numerous felony arrests and convictions of persons for the manufacture of marijuana. SFC David Caruthers has approximately 12 years experience with the Governor's Task Force on Marijuana Eradication. Your affiant has approxim[a]tely 6 and ½ years experience in law enforcement and 4 and ½ years experience with the Tennessee Alcoholic Beverage Commission and has investigated, charged, and gained convictions on numerous individuals for the cultivation of marijuana.

At the hearing on the motion to suppress, neither side presented evidence. There was no apparent factual dispute, as both parties agreed that the search of the outbuilding preceded the search warrant, and the state conceded that the search of the outbuilding "might be illegal." The court denied the motion to suppress without making any findings but allowed the defendant to amend his motion and have a further hearing at a later date. The technical record contains a written motion to suppress dated after the hearing, but it does not contain a transcript of any further suppression hearing.

At the trial, David Crothers of the Tennessee National Guard testified that after Pat Unger identified marijuana during the aerial surveillance, he, Steve Talley, and a third person whose identity he did not remember went to the location of the plants. He said they accessed the area by parking in a gravel driveway and walking through "an overgrown area." He said there were a total of five marijuana patches which were surrounded by chicken wire fencing. He said there were paths between the patches. He said he followed one of the paths out of the tree line and found that it connected with a wheeled-vehicle path in a hay field. He said the wheeled vehicle path led to "a

kennel or a dog lot, a building with a fenced in area behind it." He said he returned to the marijuana patches and uprooted the plants. He said the patches appeared to be cultivated because in addition to the fencing, there was a bag of fertilizer by the first patch.

Steve Talley of the Tennessee Bureau of Investigation testified that the group that went to locate the marijuana parked at a residence which neighbored the defendant's. He said that he and Sergeant Crothers entered the woods to find the marijuana patch that the helicopter pilot had spotted. He said he heard someone arriving at the residence where they had parked and went to talk to the people. He said he then went to another residence and knocked on the door but did not think anyone answered. He said Sergeant Crothers met him and that he began preparing a search warrant affidavit in his car with information Sergeant Crothers provided about what he had seen in the woods. He said he left to obtain the search warrant, returned with the search warrant, and participated in the search and seizure of the outbuilding, woods, and residence.

Although the trial court did not make factual findings in the present case, the determinative facts are undisputed. Where the facts are undisputed, appellate review is conducted de novo. State v. Daniel, 12 S.W.3d 420, 423 (Tenn. 2000). There is no factual dispute that the authorities found the marijuana before they discovered the outbuilding. Likewise, it is apparent that the search warrant affidavit contains no reference to the items discovered during the warrantless search of the outbuilding. We conclude, as did the trial court, that the search conducted with the warrant was not tainted by any illegality in the warrantless search of the outbuilding because the information in the warrant was from an independent source. The defendant is not entitled to relief.

II

The defendant's next issue is whether the trial court erred in denying judicial diversion. He argues that the trial court failed to consider the requisite factors and that he was a favorable candidate for diversion because he was forty-three years old and had no prior criminal convictions.

A defendant is eligible for judicial diversion when he or she is found guilty or pleads guilty to a Class C, D, or E felony and has not previously been convicted of a felony or a Class A misdemeanor. See T.C.A. § 40-35-313(a)(1)(B). As previously noted, judicial diversion allows the trial court to defer further proceedings without entering a judgment of guilt and to place the defendant on probation under reasonable conditions. Id. at (a)(1)(A). When the probationary period expires, if the defendant has completed probation successfully, then the trial court will discharge the defendant and dismiss the prosecution with no adjudication of guilt. See id. at (a)(2). The defendant may then apply to have all records of the proceedings expunged from the official records. See id. at (b). A person granted judicial diversion is not convicted of an offense because a judgment of guilt is never entered. See id. at (a)(1)(A).

Judicial diversion is not a sentencing alternative for a defendant convicted of an offense. See T.C.A. § 40-35-104(c). Therefore, there is no presumption that a defendant is a favorable candidate for judicial diversion. See State v. Bingham, 910 S.W.2d 448, 456 (Tenn. Crim. App. 1995),

overruled on other grounds by State v. Hooper, 29 S.W.3d 1, 9 (Tenn. 2000). When a defendant challenges the manner of serving a sentence, this court conducts a de novo review of the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d) (2003).[1] However, when the accused challenges the trial court's denial of a request for judicial diversion, a different standard of appellate review applies. Because the decision to grant judicial diversion lies within the sound discretion of the trial court, this court will not disturb that decision on appeal absent an abuse of discretion. State v. Electroplating, Inc., 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998); State v. Bonestel, 871 S.W.2d 163, 168 (Tenn. Crim. App. 1993), overruled on other grounds by State v. Hooper, 29 S.W.3d 1, 9 (Tenn. 2000). An abuse of discretion exists if the record contains no substantial evidence to support the denial. State v. Hammersley, 650 S.W.2d 352, 356 (Tenn. 1983); Bonestel, 871 S.W.2d at 167.

In determining whether to grant judicial diversion, the trial court must consider (1) the defendant's amenability to correction; (2) the circumstances of the offense; (3) the defendant's criminal record; (4) the defendant's social history; (5) the defendant's physical and mental health; (6) the deterrence value to the defendant and others; and (7) whether judicial diversion will serve the ends of justice. Electroplating, 990 S.W.2d at 229; State v. Parker, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996); Bonestel, 871 S.W.2d at 168. In addition, "the record must reflect that the court has weighed all of the factors in reaching its determination." Electroplating, 990 S.W.2d at 229. If the trial court refused to grant judicial diversion, it should state in the record "the specific reasons for its determinations." Parker, 932 S.W.2d at 958-59. If the trial court "based its determination on only some of the factors, it must explain why these factors outweigh the others." Electroplating, 990 S.W.2d at 229.

The defendant has not demonstrated an abuse of the trial court's discretion in denying diversion. The defense argued that the defendant was self-employed in the timber industry, that it was his busy time of year, and that the forty-three-year-old defendant had no prior criminal convictions. There was no presentence report prepared for the defendant, and no evidence was offered at the sentencing hearing. The record contains little to no information about the defendant's social history and the defendant's physical and mental health, both of which are factors to be considered in making a determination. The record does contain information that the defendant denied any responsibility for the crimes of which he was convicted, despite the fact that the drugs he was convicted of possessing were found in his bedroom. We cannot conclude, based upon the defendant's meager effort at demonstrating his suitability for diversion, that the trial court abused its discretion in denying diversion.

[1] We note that on June 7, 2005, the General Assembly amended Tennessee Code Annotated sections 40-35-102(6), -114, -210, -401. See 2005 Tenn. Pub. Acts ch. 353, §§ 1, 5, 6, 8. However, the amended code sections are inapplicable to the defendant's appeal.

III

The defendant also raises related sentencing issues. He claims that the trial court erred in imposing a sentence of split confinement rather than total probation and in imposing an excessive jail sentence. We consider these issues in concert.

Appellate review of misdemeanor sentencing is de novo on the record with a presumption that the trial court's determinations are correct. T.C.A. §§ 40-35-401(d), -402(d). This presumption of correctness is conditioned upon the affirmative showing that the trial court considered the relevant facts, circumstances, and sentencing principles. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). As the Sentencing Commission Comments to section 40-35-401(d) note, the burden is now on the appealing party to show that the sentence is improper.

When imposing a misdemeanor sentence, the trial court is not required to conduct a sentencing hearing, but it must afford the parties a reasonable opportunity to address the length and manner of service of the sentence. T.C.A. § 40-35-302(a). The trial court must impose a specific sentence in terms of the months, days, or hours to be served. Id. at (b). Then, the trial court must set the percentage of the sentence that the defendant is to serve in incarceration before being considered for various rehabilitative programs. Id. at (d). We note that the law provides no presumptive minimum for misdemeanor sentencing. State v. Creasy, 885 S.W.2d 829, 832 (Tenn. Crim. App. 1994). Moreover, in misdemeanor sentencing, the trial court is not required to place specific findings on the record. State v. Troutman, 979 S.W.2d 271, 274 (Tenn. 1998). However, the trial court must consider the purposes and principles of the Criminal Sentencing Reform Act of 1989. T.C.A. § 40-35-302(d); see Troutman, 979 S.W.2d at 274 (holding that "while the better practice is to make findings on the record when fixing a percentage of a defendant's sentence to be served in incarceration, a trial court need only consider the principles of sentencing and enhancement and mitigating factors in order to comply with the legislative mandates of the misdemeanor sentencing statute").

The defendant claims that he should have been granted a sentence of complete probation. He argues that the nature of his employment in the timber industry, which requires him to travel, his age, and his lack of a prior criminal history all weigh in favor of a grant of probation. He claims, as well, that the trial court erred in imposing the jail components of his sentences because the court did not mention each of the sentencing factors individually and failed to indicate its weighing of the factors.

We note, first, that the trial court complied with the statutory mandate for misdemeanor sentencing. The court was not required to make detailed findings on the record. Troutman, 979 S.W.2d at 274.

The trial court's observations reflect that it was mindful of the purposes and principles of the Sentencing Act. The court stated that it had "taken into consideration the facts and circumstances at trial, and the nature of the offenses, and the lack of prior criminal history by the defendant, and

the likelihood for re-offending, and all the other factors consistent with the sentencing guidelines." Upon review, we hold that the defendant has not overcome the presumptive correctness of the sentences imposed. The defendant was in possession of two controlled substances in a home he shared with his minor son. In his trial testimony, he denied ownership of the drugs that were found in his bedroom. The trial court was within its purview in denying total probation based upon all of the facts and circumstances of the case.

In consideration of the foregoing and the record as a whole, the judgments of the trial court are affirmed.

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JOSEPH M. TIPTON, PRESIDING JUDGE